Supreme Court, U.S.
FILED
SEP 30 1996
CLERK

No. 96-160

In the Supreme Court of the United States

OCTOBER TERM, 1995

KENTUCKY STATE POLICE DEPARTMENT, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

C. GREGORY STEWART
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

PAUL BOGAS
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTIONS PRESENTED

I. Whether the court of appeals correctly concluded that the Kentucky State Police Department failed to show that mandatory retirement at age 55 for police officers was justified as a "bona fide occupational qualification" under Section 4(f)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986).

II. Whether the court of appeals correctly refused to deduct the amount of unemployment compensation received by state police officers from their back pay awards under the Age Discrimination in Employment Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Doyne v. *Union Elec. Co.*, 953 F.2d 447 (8th Cir. 1992)	12
EEOC v. *City of East Providence*, 798 F.2d 524 (1st Cir. 1986)	7, 9
EEOC v. *Mississippi State Tax Comm'n*, 873 F.2d 97 (5th Cir. 1989)	7, 9, 10
EEOC v. *Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), cert. denied, 474 U.S. 828 (1985)	7
EEOC v. *Pennsylvania*, 829 F.2d 392 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988)	6, 7, 8
EEOC v. *Tennessee Wildlife Resources Agency*, 859 F.2d 24 (6th Cir. 1988), cert. denied, 489 U.S. 1066 (1989)	8
EEOC v. *Wyoming*, 771 F.2d 1425 (10th Cir. 1985)	12
Glover v. *McDonnell Douglas Corp.*, 12 F.3d 845 (8th Cir.), cert. denied, 114 S. Ct. 1647 (1994)	12
Hawley v. *Dresser Indus., Inc.*, 958 F.2d 720 (6th Cir. 1992)	13
Heiar v. *Crawford County*, 746 F.2d 1190 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985)	7, 9
Johnson v. *Mayor & City Council of Baltimore*, 472 U.S. 353 (1985)	11
Kentucky State Police Dep't v. *EEOC*, cert. denied, 490 U.S. 1066 (1989)	4

Cases—Continued: Page

Lussier v. *Runyon*, 50 F.3d 1103 (1st Cir.), cert. denied, 116 S. Ct. 69 (1995) 12
Naton v. *Bank of California*, 649 F.2d 691 (9th Cir. 1981) 12
Orzel v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743 (7th Cir.), cert. denied, 464 U.S. 992 (1983) 12
Rasimas v. *Michigan Dep't of Mental Health*, 714 F.2d 614 (6th Cir. 1983), cert. denied, 466 U.S. 950 (1984) 5, 13
Satty v. *Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975), aff'd in part, vacated in part, 434 U.S. 136 (1977) 12, 13
Usery v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) 5
Western Air Lines, Inc. v. *Criswell*, 472 U.S. 400 (1985) 2, 5
Wisniewski v. *United States*, 353 U.S. 901 (1957) ... 13

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* (1982 & Supp. IV 1986) 2
§ 4(a)(1), 29 U.S.C. 623(a)(1) 2
§ 4(f)(1), 29 U.S.C. 623(f)(1) 2, 6
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 5, 13
42 U.S.C. 2000e-5 12
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* 12
Ky. Rev. Stat. Ann. § 16.505(15) (Michie/Bobbs-Merrill 1985) 2

Miscellaneous:

Intercollegiate Research Programs Center for Applied Behavioral Sciences, 1 *Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs: Technical Report* (Jan. 31, 1992) 10

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 96-160

KENTUCKY STATE POLICE DEPARTMENT, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 1-9) is reported at 860 F.2d 665 (*KSP I*). The second opinion of the court of appeals (Pet. App. 11-40) is reported at 80 F.3d 1086. The opinion of the district court dated December 17, 1986 (Pet. App. 41-49) is unreported.

JURISDICTION

The final judgment of the court of appeals was entered on April 1, 1996. Petitioners were granted an extension of time until July 30, 1996, in which to file their petition for certiorari. The petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, the Kentucky State Police Department, et al. (petitioners or KSP), are responsible for enforcing state criminal and traffic laws. Under Kentucky law, Ky. Rev. Stat. Ann. § 16.505(15) (Michie/Bobbs-Merrill 1985), all Kentucky State Police officers must retire at age 55. On August 29, 1984, the Equal Employment Opportunity Commission (EEOC) filed this action against petitioners under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* (1982 & Supp. IV 1986). The complaint alleged that petitioners' retirement rule violated Section 4(a)(1) of the ADEA, which makes it unlawful for an employer "to discharge any individual * * * because of such individual's age." 29 U.S.C. 623(a)(1). The petitioners defended the retirement rule as a lawful "bona fide occupation qualification [BFOQ] reasonably necessary to the normal operation of the particular business" under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1).

2. Following a trial, the district court concluded that petitioners' mandatory retirement rule was justified as a BFOQ under Section 4(f)(1) of the ADEA. Pet. App. 41. In evaluating petitioners' BFOQ defense, the court purported to apply the two-part test approved in *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 414-416 (1985): That the employer show that (1) the job qualifications at issue—here, adequate aerobic capacity and the absence of heart disease—are reasonably necessary to its particular business, and (2) that "substantially all people over the mandatory retirement age cannot safely perform the duties of

the job or that it would be highly impractical to deal with class members on an individual basis." Pet. App. 42-43. The district court noted that "[t]his is a close case," but found that "cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance" of an officer's job "[e]ven though * * * the Department here has no in-service fitness screening." *Id.* at 43-44. Turning to the second part of the test, the court found that "there is a significant increase in coronary risk with age" and that "non-intrusive testing for cardiovascular disease is not sufficiently advanced to be a reliable substitute for the mandatory retirement age." *Id.* at 44-45. By contrast, the court found that the requisite aerobic capacity "can be accurately tested" on an individual basis. *Id.* at 45.

3. The court of appeals reversed and remanded. Pet. App. 1-9. It held the district court's findings clearly erroneous because the lower court did "not take into account the total and crucial facts of this case." *Id.* at 3. The court held that petitioners had not shown that the absence of heart disease was a necessary characteristic of a Kentucky state officer. Reviewing the record, the court of appeals found that petitioners "repeatedly permitted officers under the age of 55 who had known health problems including heart conditions to remain on the job with no diminution of duties." *Id.* at 4. The court noted that KSP "has no program for testing the fitness of its officers either as to aerobic or cardiovascular health." *Id.* at 3-4. The court found it significant that KSP "permits officers to remain on the job in spite of known heart attacks or by-pass surgery." *Id.* at 3. The court observed that one officer "died of his fourth heart attack at the age of 49 while on a routine patrol

in his cruiser." *Id.* at 4. Accordingly, the court held that petitioners failed to show that 55-year age limit is a BFOQ. Judge Engel dissented because, in his view, the case "discloses no * * * lack of good faith by the Kentucky State Police." *Id.* at 9. On May 15, 1989, this Court denied the petitioners' petition for certiorari in *KSP I*. *Id.* at 10 (490 U.S. 1066).

4. On remand, the district court issued two judgments providing back pay and other relief to the officers. The April 5, 1993, judgment provided relief to those officers mandatorily retired between October 19, 1981, and December 31, 1986. Pet. App. 63. The May 23, 1994, judgment provided relief for those officers mandatorily retired between January 1, 1979, and October 19, 1981. *Id.* at 50. On June 21, 1994, the Commission and petitioners entered into a partial settlement agreement for the claims of 19 officers.

Petitioners appealed the district court's rulings regarding relief, including the district court's refusal to deduct the amount of unemployment compensation received by the officers after their retirement. The EEOC cross-appealed on other issues regarding the scope of relief. On April 1, 1996, the court of appeals issued its opinion affirming in part and reversing in part. Pet. App. 11-40. The court of appeals held, *inter alia*, that the district court did not abuse its discretion by refusing to deduct unemployment payments from the back pay awards made to the identified victims of petitioners' age discrimination. *Id.* at 39. The court of appeals indicated that it might have decided the issue differently as a matter of first impression because the State was both the discriminating employer and the administrator of the State's unemployment compensation program, but the court nevertheless was bound by its prior decision in

Rasimas v. *Michigan Department of Mental Health*, 714 F.2d 614, 627 (6th Cir. 1983), cert. denied, 466 U.S. 950 (1984), which held that unemployment benefits were "collateral benefits" and not deductible from back pay awards in Title VII cases. Pet. App. 38-39.

ARGUMENT

Most of petitioners' brief (Pet. 12-22) is directed to challenging the court of appeals' 1988 decision in *KSP I* on liability. Petitioners sought certiorari on that decision, which was denied. Pet App. 10. There is no reason to take a different course now. Both decisions of the court of appeals are entirely consistent with this Court's precedents, and they do not present a conflict calling for this Court's review.

1. In *Western Air Lines, Inc.* v. *Criswell*, *supra*, this Court adopted a two-part test (first developed in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976)) that an employer must satisfy in order to justify its use of a mandatory retirement age. 472 U.S. at 414-416. The employer must show: (1) that a certain trait is a bona fide and reasonably necessary qualification for the position; and (2) that all or substantially all employees above the age limit lack the required qualification, or that it is impracticable for the employer to identify those who lack the required trait by individual testing.

Contrary to petitioners' assertion (Pet. 14-15), the court of appeals did not distort the first part of the *Criswell* test. The court simply held that petitioners failed to prove that the absence of heart disease is a necessary qualification for police officers. That holding is well supported by the record. The former director of KSP testified that the initial selection of age 55 as a mandatory retirement age had nothing to

do with health, fitness, or an officer's ability to do the job. *KSP I* EEOC C.A. Br. 22. The evidence also showed that petitioners permitted officers under age 55 who had known health problems, including heart disease, to remain on the job with no reduction in duties. Pet. App. 4. Moreover, petitioners allowed officers who had heart attacks and heart by-pass surgery to remain on the job. *Ibid.* One officer was retained even after he had three heart attacks. *Ibid.* Finally, petitioners made no effort to maintain or test the cardiovascular fitness of most of its officers. *Id.* at 3. Thus, by their own actions, petitioners have shown that lack of heart disease in its officers is not "reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1). Accordingly, the court of appeals' decision is entirely consistent with *Criswell* and imposed no higher burden on petitioners than the plain language of the statute mandates.

Petitioners argue that the decision in *KSP I* requires it to adopt fitness testing programs in order to establish age as a BFOQ. That is not correct. The court of appeals held that a characteristic used to justify mandatory retirement "must be a trait that the employer at least attempts to require of employees of all ages." Pet. App. 8 (quoting *EEOC* v. *Pennsylvania*, 829 F.2d 392, 296 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988)). Here, the absence of testing, along with the other facts, demonstrated that cardiovascular and aerobic health was not reasonably necessary to the job positions at issue. The court did not state that testing is the only way an employer can attempt to require that trait of younger employees, nor did it impose any particular rule of testing on petitioners. And, in any event, petitioners' claim that

a testing program would be ineffective and unduly burdensome (Pet. 19-20) is belied by the record, which shows that KSP gives regular physical fitness tests to its "special response teams." Pet. App. 3 n.1, 4.[1]

Petitioners contend that courts of appeals "follow divergent roads in BFOQ analysis." Pet. 15. Petitioners state that the correct view is set forth in the First Circuit's decision in *EEOC* v. *City of East Providence*, 798 F.2d 524 (1986), the Eighth Circuit's decision in *EEOC* v. *Missouri State Highway Patrol*, 748 F.2d 447 (1984), cert. denied, 474 U.S. 828 (1985), and the Fifth Circuit's decision in *EEOC* v. *Mississippi State Tax Commission*, 873 F.2d 97 (1989) (en banc), which treat the administration of fitness-for-duty tests as relevant but not dispositive evidence of whether the *Criswell* BFOQ standard had been met. Pet. 15-16. The conflicting view, according to petitioners, requires an employer to implement fitness tests for all officers in order to establish a BFOQ defense. Pet. 9-10. Petitioners claim that this view is reflected in the court of appeals' decision in *KSP I*, the Third Circuit's decision in *EEOC* v. *Pennsylvania*, 829 F.2d 392 (1987), cert. denied, 485 U.S. 935 (1988), and the Seventh Circuit's decision in *Heiar* v. *Crawford County*, 746 F.2d 1190, 1198 (1984), cert. denied, 472 U.S. 1027 (1985). Pet. 15-18. As discussed above, however, the court of appeals in *KSP I* did not rely solely on the absence of fitness tests for younger

---

[1] Petitioners suggest that the district court found that fitness tests are "ineffectual for law enforcement officers of retirement age." Pet. 19. However, the district court found that testing could determine aerobic capacity and might identify individuals at high risk for cardiovascular disease, but could not decisively determine the absence of coronary disease. Pet. App. 45.

officers to support its conclusion that petitioners had failed to establish that lack of heart disease was a bona fide job qualification (Pet. App. 2-5). It also relied on the fact that younger officers who were known to lack the asserted qualification (*i.e.*, absence of heart disease) were allowed to continue working and that they performed competently. See also *EEOC* v. *Tennessee Wildlife Resources Agency*, 859 F.2d 24, 26 (6th Cir. 1988) (employer's failure to give fitness tests to officers was just one of four types of evidence relevant to the question whether a mandatory retirement age of 55 was a permissible BFOQ), cert. denied, 489 U.S. 1066 (1989).[2]

The Third Circuit in *Pennsylvania* stated that, "[b]efore a characteristic can be a reasonably necessary BFOQ, it must be a trait that the employer at least attempts to require of employees of all ages." 829 F.2d at 396. The court ruled that, "[u]ntil minimum standards are developed, implemented and enforced, the [agency] cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQs reasonably necessary to [its] business." *Id.* at 395. That ruling does not mandate fitness testing but merely requires that, if fitness is a retention criterion for older workers, it must be a retention criterion for younger workers too. Nor did the Seventh Circuit in *Heiar* v. *Crawford County* "improperly augment[] the BFOQ test," as suggested by petitioners. Pet. 12. That case does not hold that testing is a requirement under the *Criswell* BFOQ

---

[2] The court in *Tennessee Wildlife Resources Agency* applied the same "governing principles" that it applied in *KSP I*. 859 F.2d at 24.

analysis, but noted that testing is relevant evidence. 746 F.2d at 1197.

Thus, contrary to petitioners' claim, there is no conflict in the circuits regarding the elements of the *Criswell* BFOQ test. Although courts of appeals have sometimes differed in articulating the standard (see, *e.g.*, Pet. App. 7), their decisions are reconcilable. No court of appeals has imposed a requirement that the employer test all officers' fitness. Rather, courts have treated the employer's testing, or lack thereof, as relevant, but not dispositive, evidence to consider in reviewing mandatory retirement laws. Nor has any court of appeals held that failure to monitor the physical fitness of officers is irrelevant to the question whether physical fitness is a reasonably necessary job qualification. See, *e.g.*, *City of East Providence*, 798 F.2d at 530 ("a city's acceptance of low physical standards, coupled with other factors, might persuade a district court that physical fitness was not deemed a necessary job qualification by that police force[,] * * * [b]ut a police force's failure continuously to monitor physical standards does not, standing alone, compel a finding that physical fitness is not a reasonably necessary job qualification"). The courts of appeals have not applied different BFOQ standards, but have simply reached different results based on different factual records. Under the legal standards this Court has established and that the courts of appeals have applied, cases are necessarily governed by pertinent factual findings, concerning such matters as job duties, the risks associated with the job positions, and the employer's actions.[3]

---

[3] With the exception of the Fifth Circuit's decision in *Mississippi State Tax Commission*, *supra*, all of the cases

Petitioners note (Pet. 19) that the temporary exemption allowing mandatory retirement rules for state or local firefighters or law enforcement officers that took effect on January 1, 1987, as part of a legislatively mandated period of study, expired on December 31, 1993. Pet. App. 77, 79. The expiration of the temporary exemption, however, does not alter the fact that the court of appeals' decision in *KSP I* properly applied the *Criswell* BFOQ standard.[4] Petitioners argue (Pet. 19) that review is warranted because termination of the exemption means that "States once again must defend their mandatory retirement programs for law enforcement officers." However, they provide no evidence that States still have mandatory retirement provisions likely to present this issue to the courts. Indeed, while petitioners cite BFOQ cases decided by courts of appeals before 1990, they

---

cited by petitioners pre-date the Court's denial of the petition for certiorari in *KSP I*. In *Mississippi State Tax Commission*, moreover, the Fifth Circuit did not decide the validity of the mandatory retirement rule for the State's tax commission officers, but simply "remand[ed] the case to the district court to consider fully the Commission's enforcement, or lack of enforcement, of the stated job qualifications of physical stamina and the ability to withstand stress." 873 F.2d at 100.

[4] Congress's unwillingness to extend the temporary exemption or amend the BFOQ provision provides further support for the result reached in *KSP I*. The study mandated by Congress yielded a unanimous report concluding that mandatory retirement of public safety officials is neither necessary nor desirable, and that individual fitness testing is a better means of assuring the performance of public safety forces. Intercollegiate Research Programs Center for Applied Behavioral Sciences, 1 *Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs: Technical Report* 20 (Jan. 31, 1992).

point to no new case on the issue arising after the temporary exemption's expiration in 1993.

Petitioners also ask the Court (Pet. 21-22) to revisit its unanimous ruling in *Johnson* v. *Mayor & City Council of Baltimore*, 472 U.S. 353, 370 (1985), that the existence of a mandatory retirement age for federal public safety officials should not be given "any weight" when determining whether a State has established a BFOQ for its public safety officials. This request should be rejected. Petitioners' argument is that "[c]ongressional treatment of the retirement age for state and federal law enforcement seems anomalous." Pet. 21. Yet the Court in *Johnson*, in rejecting a similar argument, unanimously concluded that "almost four decades of legislative history establish that Congress at no time has indicated that the federal retirement age for federal firefighters is based on a determination that age 55 is a BFOQ within the meaning of the ADEA." 472 U.S. at 369.

2. Petitioners contend that the court of appeals erroneously affirmed the district court's decision not to deduct the amount of unemployment insurance received by the officers from the individual back pay awards, and that the courts of appeals differ as to whether "unemployment compensation may not, as a matter of law, be deducted from back pay awards" or whether the issue is within "the discretion of the trial court" (Pet. 23-25).

In urging the Court to adopt a rule which vests the district court with discretion to deduct unemployment compensation benefits from awards in an ADEA case, petitioners reason that the source of those benefits is not collateral because the State of Kentucky is both the source of the benefits and the defendant. Pet. 11, 25. However, petitioners point to no conflict in

the circuits regarding the issue as presented by petitioners: "Should back pay damages awarded to retired State employees in an age discrimination case be reduced—either as a matter of law or within the discretion of the trial court—by the State employer's payments of unemployment compensation to those retired State employees?" Pet. i.

Indeed, the two cases cited by petitioners do not address the question and arise under different statutes. See *Satty* v. *Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975) (upholding district court's deduction of temporary wages and unemployment insurance in case arising under Title VII, 42 U.S.C. 2000e-5), aff'd in part, vacated in part, 434 U.S. 136 (1977); *Lussier* v. *Runyon*, 50 F.3d 1103, 1112 (1st Cir.) (upholding district court's deduction of Veterans Administration benefits from front pay awards in a case arising under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*), cert. denied, 116 S. Ct. 69 (1995). Nor does the decision in *Lussier* refer to a circuit split on the issue addressed by the court of appeals in the present case.[5] *Lussier* cites two cases arising under the ADEA in which it was held that trial courts have discretion to deduct unemployment compensation from back pay awards. *Orzel* v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743, 756 (7th Cir.), cert. denied, 464 U.S. 992 (1983); *Naton* v. *Bank of California*, 649 F.2d 691, 700 (9th Cir. 1981). Neither of those cases, however, con-

---

[5] Moreover, two of the five ADEA cases *Lussier* cites from outside the Sixth Circuit involve offset of pension benefits (*Glover* v. *McDonnell Douglas Corp.*, 12 F.3d 845, 848 (8th Cir.), cert. denied, 114 S. Ct. 1647 (1994); *Doyne* v. *Union Elec. Co.*, 953 F.2d 447, 451-452 (8th Cir. 1992)), and a third involves offset of social security benefits (*EEOC* v. *Wyoming*, 771 F.2d 1425, 1431-1432 (10th Cir. 1985)).

flicts with the court of appeals' decision in the present case, which held that the district court "did not abuse its discretion in declining to deduct unemployment compensation." Pet. App. 39.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

C. GREGORY STEWART
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

PAUL BOGAS
Attorney
Equal Employment Opportunity Commission

SEPTEMBER 1996

---

[6] Petitioners suggest (Pet. 23-25) that the court of appeals' decision in this case has created confusion within the Sixth Circuit because the court, while referring to no "abuse of discretion" by the district court in the present ADEA case, cited its prior decision in *Rasimas*, *supra*, which holds that unemployment payments are not deductible from back pay awards in Title VII cases. See also *Satty* v. *Nashville Gas Co.*, *supra*, and *Hawley* v. *Dresser Indus., Inc.*, 958 F.2d 720, 726 (6th Cir. 1992) (upholding district court's deduction of pension benefits from ADEA back pay award). Any inconsistency in Sixth Circuit decisions, however, is a matter for that court, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).